

December 5. 1767.

*9th Decr
1767*

Unto the RIGHT HONOURABLE,
The LORDS of COUNCIL and SESSION,

*All
16th Decr
1767
sent to P
Ordinary to
take Edgar's
oath*

T H E

P E T I T I O N

O F

QUINTIN MITCHELL in Garryhorn,

HUMBLY SHEWETH,

THAT your petitioner is pursued, in a process of removing, at the instance of Theodore Edgar of Elshehiells, which, in various shapes, has for some time been litigated with unusual keenness on the part of the pursuer.

The facts are as follow :

The petitioner having, some years ago, acquired right to a current tack of the lands of Drumnesh and Craiglingal, belonging in property to Mr Edgar, which tack expired at Whitfunday 1764; and being anxious to have a new lease of the same, as they lie very conveniently for him, and contiguous to his other possessions, he applied to Mr Ferguson
of

of Craigdarroch, who, at Mr Edgar's desire, had viewed the grounds and put a value upon them, and proposed to him taking the same for nineteen years at a certain rent. Accordingly it appears, that Mr Ferguson did report to Mr Edgar the petitioner's proposal; in consequence of which, Mr Edgar, on the 30th of July 1765, wrote a letter to the petitioner, wherein he inserts a letter from Mr Ferguson, and adds in answer as follows:

covenant
clear
clear
under lease.
 "My proposals are, that you shall have the refusal of a tack, with the usual covenants, for eleven years, at L. 25 a year, clear of all burdens or taxes; and that you shall build the dykes as above proposed with all expedition; and that, in case you die or sublet the farm, a clause must be in the lease, or tack, that Mr Edgar, or his heirs, must approve the under-tenant. These are my terms, and I will grant no other; therefore please favour me with your answer as soon as you can conveniently," &c.

On receipt of this letter, a full copy of which is annexed, the petitioner was made perfectly easy, nor had the least doubt of his being secured in the possession of the foresaid lands for the space of eleven years, knowing that a missive was equally binding on Mr Edgar with a tack: However, to have a tack regularly extended, he proposed to meet Mr Edgar at Dumfries in the month of September 1765; but was necessarily detained at home by people who had come to purchase wool from him.

He therefore sent his brother Robert Mitchell to meet Mr Edgar, and let him know that his offer of a tack had been accepted of, and to fix a time when the petitioner should come to Dumfries and have the tack extended in Mr Edgar's presence.

Accordingly the petitioner's brother did meet with Mr Edgar, and paid him a year's rent of the lands, conform to receipt produced in process; and, at the same time, made an

an appointment with Mr Edgar for a meeting between him and the petitioner.

In consequence of this appointment, the parties did actually meet at Dumfries in November 1765, and went to the house of Mr Malcolm, a writer there, in order to have the tack extended.

But it seems, that by this time Mr Edgar had got a more advantageous offer for the lands ; and therefore wanted to fall on some pretext to get off with the petitioner : So, in order to bring this about, he insisted that the tack should be regulated by the new stile. This he well knew the petitioner would never agree to ; because he possessed the lands according to the old stile ; and consequently his entry was according to that stile : So that making the ish or expiry of his tack according to the new stile, cut him out of eleven days, besides throwing him out of possession at a time when, by the universal custom of that part of the country, he could not enter to any other farm.

Upon this pretext, Mr Edgar was pleased to tell the petitioner, that since he refused to agree to the new stile, and would, forsooth, fly in the face of an act of parliament, with a great deal more to the same purpose, he would not let him have the lands at all ; and, affecting to be in a very great passion, he left the petitioner abruptly.

The petitioner, conscious that he already had a right to a lease for eleven years by Mr Edgar's missive, and therefore being not a bit disturbed by all these big words, very calmly told Mr Edgar, that he was willing to stand to the terms of the missive, but that he would not recede from them in a single article.

Soon after the parties had this meeting, Mr Edgar thought proper to set the lands to other two tenants for the space of eleven years after Whitsunday 1766, as appears by a tack produced, dated 25th December 1765 ; and in the month of March 1766, he commenced a process of removing before the
stewart-

stewart-depute of Kirkcudbright against the petitioner, to have him removed at the ensuing Whitsunday.

In defence of this action, it was pleaded for the petitioner, *1st*, That the pursuer had produced no title in his person to carry on the action: *2^{dly}*, That the principal tacksmen was not called: *3^{dly}*, That the pursuer's holograph missive was equally sufficient as a tack; and therefore the defender could not be removed.

Your Lordships need not be troubled with a recapitulation of the various steps of procedure had before the stewart; the petitioner shall only observe, that as the stewart-substitute sustained action at the pursuer's instance, without any title being produced for him, the defender complained of that judgment by bill of advocation; and the Lord Kennet Ordinary, on the 24th April 1766, upon advising the bill, with answers, replies, duplies, and triplies, "remitted the cause, with this instruction, That he ordain the pursuer to produce his title to carry on the removing."

As the pursuer had then no title to produce, the instruction given by the Lord Ordinary proved fatal to his plea; so that he was obliged to drop the process in which his keenness had led him to be premature.

However, Mr Edgar having expedite a charter under the Great Seal 6th August 1766, whereupon he was infeft 15th September, and had his seifine registrate at Dumfries 13th October the same year, he, with as much keenness as ever, raised a process before this court against the petitioner for having him removed at Whitsunday 1767.

Against this action, the petitioner pleaded, that he was intitled to hold his possession for eleven years, in virtue of the pursuer's holograph missive above recited; and that the pursuer could not be allowed to proceed in his process, until he paid to the defender the expences he had unnecessarily been put to by the process before the inferior court, to
which

which he humbly contended he was well intitled, as that process was advocated and joined with the present process.

Lord Justice Clerk Ordinary, on advising minutes of debate, was pleased, on the 21st February 1767, to pronounce the following interlocutor: " Having considered the con-
 " joined processes and above debate, before answer, ordains
 " the pursuer, on or before the 28th instant, to confess or
 " deny, by a writing under his, or the hand of his procu-
 " rators, whether or not the defender sent him notice by
 " his brother, that he was to accept of his offer of a tack
 " for 11 years; and whether or not the parties did after-
 " wards meet at Dumfries, and in the house of Mr Mal-
 " colm writer, in order to have the tack extended; and also
 " to condescend upon the reason why the tack was not ex-
 " tended accordingly; and particularly, to answer whether
 " this was owing to their different opinions about the issue
 " of the tack, as mentioned by the defender in the third
 " page of the minute, or to what other cause."

In terms of this interlocutor, Mr Edgar gave in answers importing a denial of the facts put to him; and replies were given in for the defender, endeavouring to shew, that no credit ought to be paid to Mr Edgar's answers, as they appeared to him inconsistent, and improbable.

But the Lord Ordinary on the 11th of March 1767, was pleased to pronounce the following interlocutor: " Having
 " considered the interlocutor of the 21st of February last,
 " with the pursuer's answers to the facts therein stated, and
 " replies for the defender, finds it proved, that the pursuer,
 " by his holograph letter dated the 30th of July 1765, ad-
 " dressed to the defender, did make offer to the defen-
 " der of a tack of the lands in question for eleven years,
 " with the usual covenants, at the rent therein mentioned,
 " and desired the defender's answer to the above offer or
 " proposal as soon as he could conveniently; and finds no
 " evidence that the defender agreed to accept of the tack,
 B " upon

“ upon the terms offered by the pursuer; and therefore re-
 “ pells the defences, and decerns in the removing, superse-
 “ ding extract till the third federunt-day of June next.”

Against this interlocutor, your petitioner preferred a representation; in which he contended, that there was sufficient evidence before the Lord Ordinary, that he had accepted of the missive. This representation having been ordered to be answered, the pursuer, as it would appear, being conscious that the proof was strong in favour of the petitioner, thought proper pretty much to wave considering it in his answers; but took up other ground, and endeavoured to maintain, that the missive founded on could not be available, unless it was shewn, that the petitioner accepted of it by returning a written answer: And this point was handled in a very elaborate and ingenious manner by the learned counsel who was employed for Mr Edgar.

The Lord Ordinary, on considering the above representation, with the answers, was pleased, on the 5th of August 1767, to pronounce the following interlocutor: “ Having
 “ considered this representation, with the answers thereto,
 “ refuses the desire of the representation, and adheres to
 “ the former interlocutor, superseding extract till the third
 “ federunt-day of November next.”

Your petitioner preferred a second representation, which his Lordship on the 23d November 1767, was pleased to refuse without answers.

Your petitioner humbly begs leave to submit his cause to the review of your Lordships.

And, in the *first* place, he does with submission contend, that a missive, granting or promising to grant a tack is binding on him who writes it, without any written acceptance on the part of him to whom it is directed. Tacks themselves were antiently considered to be monolateral deeds of the nature of charters, so that the granter came under a written obligation to the grantee, who again, on his part, testified

fied his acceptance *rebus et factis*; and the petitioner is advised that there is no positive legal alteration with regard to this. Certain it is, that over all the counties in Scotland, lands are frequently set by missives; which method, indeed, is by many people preferred to the formality of granting tacks; and it is a jest to say that the one party is only bound: For if a tenant shall enter to possession upon a missive, he can defend himself in a process of removing in no other way, than by producing that missive, to fullfill the terms of which he is bound as much as he possibly could be by a tack; as the petitioner has all along considered himself as bound by the accepted missive on which he now pleads.

That the missive was accepted, your Lordships have, in the first place, a receipt granted by Mr Edgar to Robert Mitchel, the petitioner's brother, of a date perfectly coincident with the time when Robert Mitchell is affirmed to have notified to Mr Edgar this acceptance; and indeed this circumstance, joined to the subsequent meeting at Dumfries, between Mr Edgar and the petitioner, and the nature of the communings then held, cannot but afford a strong conviction that the petitioner really had accepted.

And in weighing this evidence, your Lordships will no doubt take into the scales, the evident interest which the petitioner had to signify his acceptance; since the grounds in question lie altogether commodious for his other possessions, of which he had a current tack. And the pursuer will no take upon him to say, that the petitioner is either ignorant or negligent in the management of his affairs.

To balance this circumstantiated evidence, your Lordships have only the answer of Mr Edgar; which, with deference, appears to be such as ought not to be greatly regarded, since Mr Edgar has there shown so many mistakes in point of fact.

A comparison between these answers and the tack now produced, will, it is hoped, fully justify this assertion.

In the answers, your Lordships are told that " Mr Edgar proposed the term of Whitsunday new stile, to be the term of entry, *believing it a nullity in the law, not to comply with the act of parliament.*"

But, on looking into the tack, it appears, that in a few weeks the pursuer learned so much of the law as to let these grounds very willingly according to the old stile; which is a demonstration, that his affected nicety about the new stile was altogether a pretence to get clear of the missive granted to the petitioner.

And your Lordships are told by this pursuer, that, in the new tack, he let the lands "*for the same rent* and term of years proposed to Quintin Mitchell."

But when the tack is looked into, it will be found, that the terms are very different from those of the missive, not only of different terms specified with regard to the building of dykes, but in the tack the tenants are to " be allowed the expences of building a barn and byre upon the said lands, suitable and proper for such farms;" for which not a shilling is allowed, nor even a word said with regard to it, in the missive.

But what must strike your Lordships very strongly, not only to show the inaccuracy of Mr Edgar's answers, but also give your Lordships a key to the pursuer's extraordinary conduct, is the differences between the missive and the tack.

In the missive the petitioner has a refusal of 'a tack " at L. 25 a-year, *clear of all burdens or taxes;*" whereas, in the new tack now produced, the tenants are taken bound " to make payment of the supply, minister's stipends, school-master's salaries, and all other burdens or impositions due and payable forth of the said lands, imposed, or to be imposed."

This

This is a material difference indeed, and is truly the difference which induced Mr Edgar first to break off from the petitioner with a quibble about the new and old stile, then to dragg him into the stewart-court, without having any title to remove; and, *lastly*, when armed with charter and seisine, to stage him before this supreme court.

When your Lordships therefore balance the evidence in favour of the petitioner, with the answers of the pursuer, it is hoped that you will be clear, that the missive was indeed accepted: But, if your Lordships should still have difficulty, the petitioner would humbly submit, if it would not be proper to take the evidence of Robert Mitchell, the bearer of the acceptance; and also the evidence of Mr Malcolm writer in Dumfries, the person employed to extend the tack in terms of that missive.

It happens indeed unluckily, that Robert Mitchell is brother to the petitioner, and therefore not so habile a witness. But as the evidence of near relations is allowed a certain degree of weight, where there is a penury of witnesses, the petitioner flatters himself, that the deposition of his brother, and Mr Malcolm, joined to the circumstances already before your Lordships, will furnish a compleat and satisfactory proof of the justice of his plea; since, in cases of this nature, where a tenant contracts with his master *bona fide*, the most strict legal proof is not required.

The petitioner would ~~also~~ beg leave to state to your Lordships another defence against this process of removing; and he shall do it in a very few words.

By the missive founded on, the petitioner has the *refusal* of a tack; and it is submitted to your Lordships, if that expression does not entitle him to plead, that this missive was still binding upon Edgar, till such time as the petitioner had given a *refusal*; that is to say, granted an express renunciation of the offer made to him.

C

Besides,

Besides, it appears from the missive, that the petitioner was not limited to any time; it only says, "Favour me with your answer so soon as you can conveniently."

Now, the pursuer will not deny, but ~~that~~ ^{that} the petitioner signified his acceptance at no great distance of time; for he accepted judicially by defending against the first process of removing, and founding on the missive, eighty days before the term; so that Mr Edgar cannot complain of having been long in uncertainty, if it can be supposed he was in any after the communing at Dumfries, when he was directly told by the petitioner, that he was to stand to the terms of the missive. At any rate, if your Lordships shall not be satisfied with the evidence already before you, and shall not think it competent to allow your petitioner to aid and compleat that evidence by the mean of proof which he has mentioned, your Lordships will be pleased to allow your petitioner to prove the acceptance of the missive, by a reference to the oath of Mr Edgar himself.

The petitioner is sorry to have troubled your Lordships with so many words on this cause. But the question in issue is a matter of some consequence to him; he cannot help feeling the hard usage he has met with from the pursuer, and is very anxious that your Lordships should see this matter in the light which he humbly maintains to be just.

May it therefore please Lordships, to alter the Lord Ordinary's interlocutors, and to find, 1mo, That from the proof now before your Lordships, your petitioner did not refuse the tack, as offered in the missive, but, on the contrary, rebus et factis acceded to it. Or, if your Lordships should not think the proof sufficient, 2do, To allow your petitioner to prove his acceptance by the oaths of Mr Malcolm writer in Dumfries, and Robert Mitchell your petitioner's brother, and to grant

grant diligence; and, if your Lordships should not agree to that mean of proof, 3tio, To allow your petitioner to prove his acceptance by the oath of Mr Edgar himself.

According to Justice, &c.

JAMES BOSWELL.

Follows Mr Edgar's holograph LETTER to the Petitioner.

Mr Mitchell,

AS I promised to write to you my resolution about your farm of Drumnefs and Craiglingall, I think it right to acquaint you, that on the 27 of August last, I received the following letter from James Ferguson, Esq; of Craigdarroch:

S I R,

" After I had viewed the ground, I met with Mr Mitchell, who seems to be a very discreet man, and conversed him fully on the subject. He wishes to take the ground, as it is convenient for his other possessions; but desired me to acquaint you, that he could not take it on any other terms than the following, viz. To pay twenty-five pounds Sterling yearly rent, and to be relieved of all public burdens, or twenty-three pounds, and him to pay all public burdens.—Part of the marches are, I see, already inclosed; and Mr Mitchell insists, and indeed very properly, that the remainder be inclosed also, and that a division-dyke shall be made through the grounds along the
" high

" high road ; he will ask no further assistance from you,
 " but apply the rents to that purpose until these dykes are
 " finished ; and from the Whitsunday after these dykes are
 " finished, he will pay an additional rent of L. 5 per cent.
 " for the money expended upon these, and at the same rate,
 " for the money expended upon the division-dyke from
 " Whitsunday after it shall be finished ; he will become
 " bound to finish all these dykes within the first four years
 " of the tack ; at the same time, he will carry them on as
 " fast as possible, and finish them sooner if it is in his
 " power. He likewise insists to have the tack for nineteen
 " years, with a power to assign or sublett in case he shall
 " happen, during the tack, to lose his other possessions ;
 " and he will be bound for the payment of the rent. His
 " reasons is, that during the years the dykes are build-
 " ing, the grounds must suffer very considerable damage,
 " by quarrying and leading the stones, and by pasturing
 " the horses, which must be grazed upon it for that pur-
 " pose ; and it will be some years after the dykes are fi-
 " nished, before the ground can fully recover the damage,
 " so as a tenant can reap the proper benefit of the inclo-
 " sing : In that view, which is a very just representation of
 " the case, one third at least of a nineteen years tack must be
 " expired before the tenant can begin to reap the benefit of
 " the tack ; and consequently, unless he is secure in the be-
 " nefit of the other two thirds, it is not to be expected he
 " will think it worth his while to be at the trouble of in-
 " closing.—Mr Mitchell is very sensible that the ground
 " is extremely convenient for him in his present situation,
 " and is very desirous to keep it ; but, at the same time, de-
 " sired me to acquaint you, that he will take it upon no
 " higher terms, and for no shorter time than nineteen
 " years."

In answer to the above, my proposals are, That you
 shall

shall have the refusal of a tack, with the usual covenants, for eleven years, at twenty-five pounds a-year, clear of all burden or taxes, and that you shall build the dykes as above proposed with all expedition; and that, in case you die, or sublett the farm, a clause must be in the lease or tack, that Mr Edgar or his heirs must approve the under-tenant. These are my terms, and I will grant no other; therefore please favour me with your answer as soon as you can conveniently, and oblige

Dr Sir,

Elshields, July 30. }
1765.

Your very humble servant,

(Signed) THEODORE EDGAR.

I shall have the refusal of a rack, with the usual cover-
 nants, for eleven years, at twenty-five pounds a year, clear
 of all burden or taxes, and that you shall build the dykes
 as above proposed with all expedition; and that, in case you
 die, or transfer the farm, a clause must be in the lease or
 rack, that Mr. Edgar or his heirs must approve the under-
 taker. These are my terms, and I will grant no other; there-
 fore please favour me with your answer as soon as you can
 conveniently, and oblige

Dr Sir,

Edinburgh, July 30.
 1762.
 Your very humble servant,

(Signed) THEODORE EDGAR.